

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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|-----------------|---|--------------------------|
| KIPTON FLEMING, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | Case Number CIV-05-690-C |
| |) | |
| EDWARD EVANS, |) | |
| |) | |
| Respondent. |) | |

ORDER ADOPTING REPORT AND RECOMMENDATION

This 28 U.S.C. § 2254 action for habeas corpus relief, brought by a state prisoner proceeding pro se, was referred to United States Magistrate Judge Robert E. Bacharach, consistent with the provisions of 28 U.S.C. § 636(b)(1)(B). Judge Bacharach entered a Report and Recommendation on October 30, 2009, recommending judgment be entered on certain of Petitioner's claims and finding that others must be resolved after an evidentiary hearing. Both parties filed a timely objection, and the Court therefore considers the matter de novo.

After that review, the Court finds Judge Bacharach properly found that Respondents are entitled to Judgment on Petitioner's claims for failure to disclose deals involving dismissal of felony charges, consent to suspension of the sentence, and gift of a car and ineffective assistance of appellate counsel for failure to discover and assert these claims on direct appeal. The objections asserted by Petitioner to the R&R's determination of these issues raise no legal or factual argument that was not fully considered and appropriately rejected by the Magistrate Judge. Despite Petitioner's arguments to the contrary, the Court

finds the relevant statements from Mr. Batton's affidavit are inadmissible for the reasons set forth by Judge Bacharach.* Further, as Judge Bacharach noted, even if the affidavit is considered, Petitioner is left unable to show facts from which a reasonable fact-finder could find a violation of Brady v. Maryland, 373 U.S. 83 (1963). As for the remaining issues, the Court finds ample support for Judge Bacharach's determination that Petitioner failed to refute the facts presented by Respondent. Thus, the Court adopts Judge Bacharach's determination that summary judgment be granted.

Turning to Respondent's Objection. Respondent argues that Judge Bacharach's R&R did not go far enough and that judgment should be entered against Petitioner on other issues raised by the Petition. The Court disagrees. Judge Bacharach correctly viewed the evidence on these issues in the light most favorable to Petitioner and granted all reasonable inferences in Petitioner's favor. Under this standard, it is clear that conducting an evidentiary hearing is necessary.

For the reasons set forth more fully herein, the Court adopts, in its entirety, the Report and Recommendation (Dkt. No. 156) of the Magistrate Judge. Likewise, the Court adopts in full Judge Bacharach's Report and Recommendation (Dkt. No. 157) on Mr. Batton's affidavit. Respondent's Motion for Summary Judgment (Dkt. No. 142) is GRANTED on Petitioner's claims for failure to disclose deals involving dismissal of felony charges, consent to suspension of the sentence, and gift of a car and ineffective assistance of appellate counsel

* As Judge Bacharach noted, this disposition renders moot Respondent's Motion to Strike portions of Mr. Batton's affidavit.

for failure to discover and assert these claims on direct appeal. The remaining issues shall be addressed following an evidentiary hearing as recommended by Judge Bacharach. This matter is recommitted to Judge Bacharach to conduct the evidentiary hearing and any other steps necessary to comply with the original Order of Referral (Dkt. No. 4). A separate judgment will issue at the close of this case.

IT IS SO ORDERED this 14th day of January, 2010.



ROBIN J. CAUTHRON
United States District Judge